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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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November, 1981

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AND
THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES
AS AMICI CURIAE
IN SUPPORT OF THE PETITIONERS

This is a brief of *amici curiae* permitted by Rule 36.2. The written consent of all parties to the case has been lodged with the Clerk, and this brief is being filed within the time allowed for filing the petitioners' brief.

INTERESTS OF THE *AMICI CURIAE*

This case raises issues of great importance to public colleges and universities across the nation. The difference between in-state and out-of-state tuition and fees represents a vital source of income to these institutions, especially in this time of decreasing governmental resources to fund public higher education. Almost ten years ago, the additional income derived from out-of-state tuition and fees was estimated at $250 to $300 million annually for the 400 public colleges and universities belonging to the National Association of State Universities and Land-Grant Colleges and the American Association of State Colleges and Universities. Waugh, *Is Out-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time, inflation, and an ailing economy have obviously heightened dependence on this important source of revenue.

The *amici curiae* are the principal associations of colleges and universities in the United States. Our member institutions comprise the overwhelming majority of publicly-supported colleges and universities in the nation.

The American Council on Education, founded in 1918, is the nation's largest association of colleges and universities. Its membership includes 1,380 institutions of higher education, 177 national and regional associations, and 61 affiliated institutions and organizations concerned with higher education in the United States. The Council, through voluntary and cooperative action, seeks to provide comprehensive leadership for improving educational standards, policies, and procedures.

The National Association of State Universities and Land-Grant Colleges is an organization representing public institutions that are among the largest colleges, universities, and complex multi-campus systems of higher education in the United States. Its 140 member institutions include land-grant colleges and universities, state universities, urban universities, and major campuses of multi-campus universities. The sector of higher education represented by the Association grants 38%

of all degrees awarded in the United States, including 36% of all bachelors, 39% of all first professional, 42% of all masters, and 64% of all doctorate degrees.

The American Association of State Colleges and Universities is an organization consisting of 345 member colleges and universities and their presidents or chancellors together with 34 associate members who are chancellors, executive directors, or heads of boards of trustees of state college systems. It was organized in 1961, and its member institutions have a total enrollment in excess of 2,500,000.

The American Association of Community and Junior Colleges was organized in 1920. Its membership of more than 900 institutions comprises a majority of the country's community and junior colleges, including both publicly and independently supported institutions, which enroll almost 5,000,000 students.

As *amici curiae,* we write to demonstrate our vital concern for the fiscal integrity of public colleges and universities. At this time of drastic budget cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective post-secondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public post-secondary institutions in the United States.

SUMMARY OF ARGUMENT

As *amici curiae,* we urge that the Court reverse the judgments of the district court and court of appeals, uphold the University of Maryland's in-state policy, and overrule *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

Irrebuttable Presumption Analysis Should Be Ended

The application of irrebuttable presumption due process analysis, as sanctioned by *Vlandis* v. *Kline,* 412 U.S. 441 (1973), provides an opportunity for courts to second guess the wisdom of rational governmental policies that would be unassailable when measured against traditional equal protection concepts. Although this Court has all but repudiated the irrebuttable presumption doctrine and declined to employ it since 1975, there are lower courts, including those in this case, that improperly continue its use. A return to reasoned constitutional adjudication requires that the irrebuttable presumption doctrine of *Vlandis v. Kline* be overruled.

Rational Basis Analysis Should Govern The Denial Of In-State Benefits To Nonimmigrant Aliens

Those groups that share in the benefits of public higher education should bear its costs proportionately. This truism is the basis for in-state/out-of-state tuition and fee differentials. Citizens and permanent resident aliens who are domiciled in the State are subject to the full range of State taxation, including the State income tax that supports public colleges and universities. As a group, they are more deserving of in-state fees than nonimmigrants (who tend to spend brief periods of time within the State or not to be subject to its income taxation), financially dependent students, and members of the Armed Forces whose fees are paid by the military, all of whom are required to pay out-of-state fees. Where some citizens and aliens can qualify for in-state tuition and fees and

others are disqualified, it is reasonable to conclude that the in-state policy does not discriminate against aliens as a class. Under these circumstances, the rational bases for the lines drawn by the in-state policy should be more than ample to sustain the policy against equal protection challenge.

ARGUMENT

I.

THE IRREBUTTABLE PRESUMPTION DOCTRINE SHOULD BE REJECTED AS A TOOL TO GAUGE GOVERNMENT CLASSIFICATIONS.

After this Court's decision in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), public colleges and universities across the United States, including the University of Maryland, changed their in-state policies to assure flexible, individualized consideration of student residency determinations in all cases where student domicile was important. Thus, elaborate and expensive procedures, with appeals mechanisms, were universally established.

These institutions continued, however, to give effect to the overriding cost-equalization basis for the in-state/out-of-state tuition and fee differential. For this reason, most public colleges and universities still deny in-state benefits, without regard to domicile, to several classes of students, including nonimmigrant aliens.

Now *Vlandis* v. *Kline* and its long-disfavored irrebuttable presumption analysis are being used to invalidate these rational in-state policies. This situation demonstrates why *Vlandis* and its irrebuttable presumption doctrine should be overruled.

As one commentator has noted, "it is difficult to recall any doctrine utilized by the Court in recent years which has met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis." Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. Colo. L.

Rev. 653 (1976). With its roots in cases decided in the heyday of substantive due process analysis,[1] the doctrine lay dormant for nearly 40 years, as this Court reestablished the line between legislation and adjudication and removed from judicial inquiry the subject of the wisdom of legislation.

When the doctrine reappeared in the early seventies, the first results of its application were neither startling nor inconsistent with those reached through more traditional methodologies. In *Bell* v. *Burson,* 402 U.S. 535 (1971), for example, the Court held that Georgia must afford a driver a hearing on fault or liability before suspending his license, a result consistent with procedural due process requirements when a "liberty" interest such as the right to pursue a livelihood is impaired; and in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), a presumption that an unwed father was unfit to have custody of his children was struck down primarily because the challenged legislative scheme affected basic civil rights such as fatherhood.[2]

In *Vlandis,* however, constitutional adjudication went awry as "strict judicial scrutiny" in the guise of the irrebuttable presumption due process doctrine was used to invalidate a concedly rationally based state classification. Despite the fact that the Connecticut in-state tuition scheme challenged in *Vlandis* created no "property" interest for out-of-state students, *Bishop* v. *Wood,* 426 U.S. 341 (1976), and implicated no "liberty" interest, *see Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 260 n.15 (1974), due process was said to require individual determination of in-state status for students. Even though no constitutionally protected interest was at stake in *Vlandis,* the majority rejected all rational interests proffered in support of the challenged classification, requiring the State,

[1] *Heiner* v. *Donnan,* 285 U.S. 312 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230 (1926). In *Schlesinger,* Justice Holmes, joined by Justices Brandeis and Stone in dissent, leveled the first blast of criticism at the doctrine. 270 U.S. at 241-42.

[2] *Stanley* was decided below and argued in this Court on equal protection grounds.

in the language of struct scrutiny, to employ the least restrictive alternative to further its ends. 412 U.S. at 451-52.

In a prophetic dissenting opinion, the Chief Justice expressed his concern over application of the irrebuttable presumption doctrine:

> There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

412 U.S. at 462.

These fears proved well grounded. *Vlandis* was followed by numerous lower court decisions featuring its unprincipled constitutional analysis. *See, e.g., Molyneaux* v. *Pennsylvania Department of Public Welfare,* 403 A.2d 634 (Pa. Commonw. Ct. 1979) (striking down welfare rule on the allocation of parental income to children); *Pentco, Inc.* v. *Moody,* 474 F. Supp. 1001 (S.D. Ohio 1978) (invalidating massage parlor regulation); *Gurmankin* v. *Costanzo,* 556 F.2d 184 (3d Cir. 1977) (school district policy preventing blind persons from

teaching sighted students invalidated); *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C. Cir. 1975) (requirement of graduate degree invalidated as qualification for professional licensure).

Vlandis also brought with it substantial critical response. Students of constitutional law found the *Vlandis* irrebuttable presumption doctrine a confusion of procedural and substantive due process, Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 Mich. L. Rev. 800, 823 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 Stan. L. Rev. 449, 461 (1975); a poor substitute for equal protection analysis, 72 Mich. L. Rev. at 829; 27 Stan. L. Rev. at 465; and a rejection of legislation by classification. Comment, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine,* 7 Ind. L. Rev. 644, 655 (1975).

In the two years after the *Vlandis* decision, the Court applied it only sparingly, in cases in which constitutionally protected interests were at stake, *Turner* v. *Department of Employment Security,* 423 U.S. 44 (1975); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), or the classification utterly lacked a rational basis. *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973). Like pre-*Vlandis* irrebuttable presumption cases, these decisions could have been reached by employing more traditional methods of constitutional analysis.

Since 1975, the Court has gone a step further. It has refused to employ the irrebuttable presumption doctrine to invalidate a single State classification. The Court has, instead, acknowledged that the irrebuttable presumption doctrine of *Vlandis* v. *Kline* is "a virtual engine of destruction for countless legislative judgments." *Weinberger* v. *Salfi,* 422 U.S. 749, 772 (1975).

Nevertheless, as the reliance on *Vlandis* below demonstrates, a clearer message is required. *Vlandis* v. *Kline* should be overruled.

II.

RATIONAL BASIS EQUAL PROTECTION ANALYSIS SHOULD BE APPLIED TO UPHOLD THE UNIVERSITY'S IN-STATE POLICY.

The in-state policy of the University of Maryland, in common with the tuition policies of most public colleges and universities, seeks to equalize educational costs by assigning in-state and out-of-state status (with appropriately differential tuition rates and fees) to its students. The University's method for achieving cost equalization is also like that of most public colleges and universities in the nation. Only citizens and permanent resident aliens are eligible for in-state status[3] because as a class nonimmigrants, due to their limited stay in this country or their exemption from income taxation, do not make full contributions to the cost of public higher education as do citizens and permanent resident aliens who are domiciled in the State. Similarly, in the case of financially dependent students, their domicile is irrelevant. Instead, the University looks to the parent or spouse who "pays the freight" to see if this person is a citizen or permanent resident alien domiciled in the State who should be accorded preferential in-state status. When the Armed Forces of the United States assigns one of its members to attend the University for educational purposes, the University assumes the Treasury's ability to pay out-of-state tuition and fee differentials and does not inquire into the individual student's domicile. Finally, when financially independent students who are citizens or permanent resident aliens are involved, their domicile in the

[3] *See* Affidavit of Wayne Sigler, ¶6 (J.A. 53A-54A). In some instances, the exclusion of nonimmigrants flows from the words of the policy, as is the case with the University of Maryland. In others, the policy is embodied in the State's law. *See, e.g.*, Cal. Educ. Code § 68076 (West); *Kirk* v. *Board of Regents of University of California*, 273 Cal. App. 2d 430, 436 n. 5, 78 Cal. Rptr. 260, 263-64 n. 5 (1969), *appeal dismissed*, 396 U.S. 554 (1970). In still other cases, the exclusion results from an interpretation of the policy's requirement of in-state domicile, as the respondents recognize. *See* Supplemental Brief For Respondents In Opposition at 4 n. 3.

State is the key to in-state status because they are subject to the full range of State taxation, including the State income tax so vital to the University's continued existence.

In 1978 and 1979 there were more than twice as many permanent resident alien undergraduate students at the University of Maryland than there were nonimmigrants, and most of the permanent resident aliens qualified for in-state tuition and fees. Affidavit of Wayne Sigler, ¶¶ 3-5 (J.A. 52A-53A). Under these circumstances, it is unreasonable to conclude that the in-state policies of public institutions of higher education like the University of Maryland discriminate on the basis of alienage and thus that strict scrutiny equal protection analysis is applicable. *See* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 Sup. Ct. Rev. 275, 313 (the State's "willingness to treat resident aliens as well as it treats citizens strongly suggests that the classification did not arise out of ill will or a stereotyped view of aliens or a desire to exploit a weak minority by imposing burdens on them while giving them few benefits.").

Simply put, it is clear that this Court has not been thinking of nonimmigrants when it has displayed special solicitude for "resident aliens." Indeed, as one perceptive commentator has concluded from the Court's first decision in this case:

> The Court's restraint in *Elkins* was revealing. Had plaintiffs been resident aliens, the Court would not have hesitated to decide the case. Any definition of domicile designed to exclude *resident* aliens from state welfare or education benefits would clearly be unconstitutional under *Graham.* The Court's decision in *Elkins* implies that nonimmigrant aliens may be restricted by a state's definition of domicile and thus may not be entitled to the "heightened judicial solicitude" extended to resident aliens.

Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?,* 31 Stan. L. Rev. 1069, 1083 (1979). *See also*

Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 Sup. Ct. Rev. at 312.

The cost equalization rationale for all in-state policies is served by ignoring the domicile of nonimmigrants, financially dependent students, and members of the Armed Forces assigned to attend the University of educational purposes. To require that a greater justification be demonstrated in the case of nonimmigrants would, we submit, be a mechanistic exaltation of form over substance which this Court should be anxious to avoid. For these reasons, we urge the Court to apply rational basis equal protection analysis to uphold the in-state policy of the University of Maryland and of most public institutions of higher education in the United States. Any other approach would not only invalidate most in-state policies but also conflict with the complementary policy of the United States Department of Education, which denies nonimmigrants low interest federal, State, and private student loans. 45 C.F.R. § 177.201 (1980).

As noted by Justice Rehnquist, dissenting from the certification of a question of State law in *Elkins* v. *Moreno,* 435 U.S. 647, 669, 675 (1978):

> [T]he University of Maryland's classification policy
>
> > "does not purport to speak in terms of the bona fides of [domicile] but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns,* [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive

them of benefits available to those who do satisfy that test." Id., [*Weinberger* v. *Salfi*, 422 U.S. 749] at 772 [(1975)].

If allowed to stand, the decision of the court of appeals threatens to imperil the fiscal integrity of public colleges and universities by making in-state tuition rates and fees available to *all* nonimmigrants, including those on student visas. *See Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."). Until the present case, no court had ever suggested that the cost-equalization rationale for according differential in-state and out-of-state tuition rates and fees could be so simplistically and devastatingly subverted.

CONCLUSION

As *amici curiae*, we urge the Court to uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all, regardless of their contributions to the costs of higher education. This would deprive State income taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the State income tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy State residents might be precluded from any higher education because of the higher cost.

We also seek to preserve an open enrollment policy among publicly-supported colleges and universities in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition and fee differentials may eliminate

this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis* v. *Kline*, 412 U.S. 441, 463 (1973) (Burger, C.J., dissenting).

Finally, we seek continuation of this Court's recognition of "[t]he State's objective of cost equalization." *Vlandis* v. *Kline*, 412 U.S. at 448. We urge the Court to facilitate this objective by upholding the right of publicly-supported institutions of higher education to classify students, including nonimmigrants, in ways reasonably calculated to achieve this goal.

As illustrated by this case, *Vlandis* v. *Kline* continues to be employed and rational in-state policies continue to be questioned. When discarded due process doctrines can be brought back to life and new equal protection analyses created to obscure the cost-equalization *raison d'etre* of in-state/out-of-state tuition and fee policies — and to imperil these policies in the process — it is time for this Court to act. For these reasons, we urge that the Court reverse the judgments of the district court and court of appeals, uphold the University of Maryland's in-state policy, and overrule *Vlandis* v. *Kline*.

Respectfully submitted,

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